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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ELIZABETH KARNAZES, Plaintiff and Appellant, v. ST. PAUL SURPLUS LINES INSURANCE COMPANY et al., Defendants and Respondents.	A139785 (City & County of San Francisco Super. Ct. No. CGC08483029)

MEMORANDUM OPINION[1]

Appellant Elizabeth Karnazes alleges that two groups of defendants, to whom we refer collectively as St. Paul and Anderlini, respectively, wrongfully interfered with and thwarted her right to collect on an attorney's lien she filed in a prior action (*Underground Lounge v. Kockos* (Super. Ct. San Mateo County, No. CIV 443818) (*Underground Lounge*)) for her fees and costs incurred representing her former client, David Melchner DBA Underground Lounge.[2] The operative, third amended complaint alleges that despite

[1] We resolve this case by memorandum opinion pursuant to California Standards of Judicial Administration, section 8.1. (See also *People v. Garcia* (2002) 97 Cal.App.4th 847, 853–855.)

[2] The St. Paul parties consist of St. Paul Surplus Lines Insurance Company (erroneously sued as Saint Paul Travelers' Insurance and Joseph Costella & Associates), Tom Collins, and Harry C. Gilbert. The Anderlini parties are Attorney David Finkelstein and the law firm of Anderlini, Finkelstein, Emerick, Smoot.

knowledge of her lien, St. Paul issued a check for its share of the settlement proceeds payable to Melchner and others, deliberately omitting Karnazes from the check, and failed to inform her that the payment was issued. It further alleges that Anderlini, which had represented Melchner in the *Underground Lounge* action *after* Karnazes, wrongfully cashed St. Paul's settlement check and prevented Karnazes from enforcing the lien. Karnazes was therefore unable to collect the attorneys' fees and costs Melchner allegedly owed her. Against St. Paul and Anderlini, the third amended complaint alleges causes of action for general negligence, intentional tort, and fraud.

St. Paul filed a motion for judgment on the pleadings, primarily asserting that because Karnazes had already litigated the very same claims in a prior case, *Melchner v. Karnazes* (Super. Ct. San Mateo County, 2009, No. CIV 458258) (*Melchner*), the instant action was barred by res judicata. Via judicial notice, St. Paul established that (1) in *Melchner*, Karnazes had cross-complained against St. Paul for its alleged wrongful interference with her lien in *Underground Lounge*; (2) after the parties settled a related, interpleader action (the *Farmers* action, discussed *post*), Karnazes dismissed her cross-complaint in *Melchner* with prejudice; and (3) the cross-complaint was dismissed in its entirety. The trial court agreed that Karnazes's dismissal with prejudice of her cross-claims in *Melchner* precluded relitigation of the same claims against St. Paul in the instant action under the doctrine of res judicata, and granted judgment on the pleadings without leave to amend.

Anderlini demurred to the third amended complaint on similar grounds. First, it argued that Karnazes's dismissal with prejudice of her cross-complaint in *Melchner,* which had alleged that Anderlini wrongfully interfered with her lien in *Underground Lounge* case, was res judicata of Karnazes's claims in the instant action. Anderlini also argued that Karnazes had re-asserted the same claims against Anderlini in an interpleader action, *Farmers Insurance Exchange v. David Melchner, et al.* (Super. Ct. San Mateo County, 2012, No. CIV461610) (*Farmers*), concerning Anderlini and Karnazes's respective rights to *Farmers'* share of the *Underground Lounge* settlement. In *Farmers* (in which Karnazes was a defendant), the trial court ruled after trial in which Karnazes

testified, that Karnazes's claims to those proceeds were barred by res judicata, due to Karnazes's dismissal of her cross-claims in *Melchner*. Anderlini thus contended that both the *Melchner* dismissal and the *Farmers* judgment precluded Karnazes's claims against Anderlini in the instant case. Again, the trial court agreed, sustaining Anderlini's demurrer without leave to amend, finding Karnazes's claims were fully adjudicated, for res judicata purposes, in both the *Melchner* and *Farmers* actions.

Following these two orders, the trial court entered judgment. Karnazes timely appealed both orders and the judgment.[3]

"A demurrer tests the legal sufficiency of the complaint. [Citations.]" (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501.) We independently review the court's decision to sustain a demurrer and determine de novo, as a matter of law, whether the complaint states a cause of action or discloses a complete defense. (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1173.) Like the trial court, we must accept as true all material facts alleged in the complaint and subject to judicial notice, and construe the complaint liberally "with a view to substantial justice." (*Ibid*.) We review the judgment, not the court's rationale. (*Harris v. Grimes* (2002) 104 Cal.App.4th 180, 185.) As appellant, Karnazes bears the burden of demonstrating that the trial court erred. (*Brown v. Crandall* (2011) 198 Cal.App.4th 1, 8.) The same standards apply to a motion for judgment on the pleadings. (*People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777.)

Karnazes challenges the trial court's ruling that her claims against St. Paul's and Anderlini are barred under the principles of res judicata. "The tenets of res judicata prescribe the preclusive effect of a prior final judgment on the merits." (*City of Oakland v. Oakland Police & Fire Retirement Systems* (2014) 224 Cal.App.4th 210, 227.) The

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[3] Anderlini filed and served a notice of entry of judgment, in which it construed the court's order sustaining its demurrer as a judgment in its favor. To the extent the court may have inadvertently failed to enter judgment for Anderlini, this court deems the order sustaining demurrer to include an appealable judgment. (See Eisenberg et al., Cal. Practice Guide: Civ. Appeals & Writs (The Rutter Group) ¶ 2:74, p. 2-52.)

primary aspect of res judicata, claim preclusion,[4] operates as a bar to the maintenance of a second suit between the same parties, or parties in privity with them, on the same cause of action. (*Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 340.) In sum, "Claim preclusion arises if a second suit involves: (1) the same cause of action[5] (2) between the same parties (3) after a final judgment on the merits in the first suit. [Citations.]" (*DKN Holdings*, *supra*, 61 Cal.4th at p. 824.)

Karnazes has failed to meet her burden, as appellant, to demonstrate error. First, her "Summary of Significant Facts" focuses on the allegations in, and procedural history of, *this* action and does not accurately set forth evidence (properly introduced below via judicial notice) concerning the two *prior* actions upon which the trial court's ruling is based. (California Rules of Court, rule 8.204(a)(2)(C)[6]; see also *Lopez v. C.G.M. Development, Inc*. (2002) 101 Cal.App.4th 430, 435, fn. 2.) Many of Karnazes's assertions regarding the *Melchner* and *Farmers* actions are not supported by citations to the record, and may thus be disregarded. (Rule 8.204(a)(1)(C); *Dominguez v. Financial Indemnity Co.* (2010) 183 Cal.App.4th 388, 392.) Certain of her contentions cannot be

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[4] "Res judicata" has been used to refer to both issue preclusion (collateral estoppel) and claim preclusion. To avoid confusion, our Supreme Court has resolved to use the term " 'claim preclusion' to describe the primary aspect of the res judicata doctrine and 'issue preclusion' to encompass the notion of collateral estoppel." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 (*DKN Holdings*).)

[5] In California, whether two lawsuits are based on the same "cause of action" is determined under the primary right theory. (*City of Oakland v. Oakland Police & Fire Retirement Systems*, *supra*, 224 Cal.App.4th at pp. 228–229.) "Under this theory, a 'cause of action' is comprised of a primary right possessed by the plaintiff, a corresponding duty imposed upon the defendant, and a wrong done by the defendant which is a breach of such primary right and duty. [Citation.]" (*Ibid*.) "The primary right is the plaintiff's right to be free of the particular injury, regardless of the legal theory on which liability is premised or the remedy which is sought. [Citations.]" (*Ibid*.) "Thus, it is the harm suffered that is the significant factor in defining the primary right at issue. [Citations.]" (*Ibid*.)

[6] Statutory references are to the California Rules of Court unless otherwise indicated.

fairly evaluated due to gaps in the record.[7] Because Karnazes's opening brief "disregards the most fundamental rules of appellate review," we may treat her arguments as waived. (*Hjelm v. Prometheus Real Estate Group, Inc*. (2016) 3 Cal.App.5th 1155, 1166; see also *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290–291 [same, and observing that a complex record increases appellants' duty to accurately summarize the record].)

Notwithstanding these failures and others,[8] the record firmly establishes that the claims asserted by Karnazes against St. Paul and Anderlini in this action were fully litigated in *Melchner* (and, as to Anderlini, in *Farmers* as well), satisfying the elements of claim preclusion. (See *DKN Holdings, supra,* 61 Cal.4th at p. 824.) First, this action and *Melchner* both concern Karnazes's claim that respondents wrongfully prevented her from enforcing her lien in *Underground Lounge*. Second, they involve the same parties, as St. Paul and Anderlini were named cross-defendants to Karnazes's amended cross-complaint in *Melchner*.[9] Third, Karnazes's dismissal of her cross-claims with prejudice in

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[7] Karnazes argues that the trial court erred in sustaining the Anderlini demurrer because it was untimely filed, but does not include in the record evidence of the date or manner of service of the third amended cross complaint. (Code Civ. Proc. §§ 430.40, subd. (a); 1013, subd. (a).)

[8] Karnazes's Second Amended Appellant's Opening Brief is not organized in a coherent or logical fashion and fails to "[s]tate each point under a separate heading or subheading summarizing the point." (Rule 8.204(a)(1)(B).) It lacks a proper statement of appealability, supported by legal authority. (Rule 8.204(a)(2)(B).) And the cover sheets and indices for her clerk's transcript are missing required information and are improperly formatted. (Rules 8.144 (b)(1), (c).)

[9] The St. Paul parties were named in the cross-complaint and amended cross-complaint, as filed. Although Karnazes contends that her cross-complaint did not name the Anderlini parties, other evidence, including a request for dismissal filed by Karnazes herself, suggests that the Anderlini parties were in fact named as cross-defendants. As the record is incomplete, we take judicial notice of the entire register of actions in the *Melchner* action, which establishes that Karnazes substituted the Anderlini parties as "Doe" cross-defendants to the first amended cross complaint on December 1, 2008. (Evid. Code, § 459, subd. (c).)

Melchner constitutes a final judgment on the merits for purposes of res judicata. (*Boeken v. Philip Morris USA, Inc*. (2010) 48 Cal.4th 788, 793.) (Further, a final judgment was entered in *Farmers*, awarding a portion of the *Underground Lounge* settlement proceeds to Anderlini and none to Karnazes.)

Karnazes's arguments to the contrary are unavailing. Her contention that it was improper for St. Paul to answer and then move for judgment on the pleadings is wrong. (Code Civ. Proc., § 438, subd. (f)(2).) Similarly, her assertion that there was insufficient evidence to support the trial court's order and there were legitimate factual disputes, below, run afoul of the applicable standard of review, discussed *ante*. Nor was the trial judge bound, as she argues, by the trial court's prior ruling on an earlier demurrer, particularly as the prior demurrer concerned only claims between Karnazes and Anderlini (not St. Paul) and relied solely upon the *Farmers* action *then pending*; by contrast, the orders challenged on appeal relied upon the *Melchner* dismissal and the *judgment* subsequently entered in *Farmers*. Likewise, the legitimacy of the *Melchner* dismissals is not properly challenged in this proceeding. (*Roybal v. Univ. Ford* (1989) 207 Cal.App.3d 1080, 1087.) Finally, the fact that the instant action was filed before Karnazes dismissed her cross-claims in *Melchner* is legally irrelevant. (*Id*. at p. 1085.)

DISPOSITION

The judgment is affirmed. St. Paul shall recover its costs on appeal. (Rules 8.278(a)(1), (2).)

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TUCHER, J.

WE CONCUR:

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STREETER, Acting P.J.

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BROWN, J.